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Recent Proposed Legislation

OHIO AND THE UNIFORM DECEPTIVE TRADE PRACTICES ACT

THE UNIFORM Deceptive Trade Practices Act¹ is divided into four main sections: definitions,² deceptive trade practices,³ remedies,⁴ and exceptions.⁵ Activities prohibited by the act fall into three categories: (1) palming or passing off, that is, selling one's goods or services as those of another;⁶ (2) disparagement of another's goods or services;⁷ and (3) false advertising.⁸ The act is designed to insure uniformity among the states in the area of unfair competition and to provide injunctive relief against practices which most of the states do not now prohibit.⁹ It is the purpose of this comment to place the Uniform Act in historical focus as it relates to the general law of unfair competition, to analyze the effects its adoption would have on Ohio law, statutory or common, and to examine some of the factors favoring or militating against its adoption in Ohio.

Unfair competition law "is traceable to the gradual recognition by the courts of the necessity of protecting the good will of an enterprise and of preventing competitors from appropriating the harvest of those who have sown."¹⁰ Since the goodwill of a business often resides in its trademarks or tradenames¹¹ and since the "law of trademarks is a part of the broader law of unfair competition,"¹² it is necessary to review the extent to which legal protection has been given to those areas covered by the act.

¹ UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 1-9 [hereinafter cited as UNIFORM ACT]. See 54 TRADEMARK REP. 897 (1964) for the text of this act.

² The act is reproduced in many places. For the note to the act, see Dole, *Uniform Deceptive Trade Practices Act: A Prefatory Note*, 54 TRADEMARK REP. 435 (1964). [hereinafter cited as *Prefatory Note*].

³ UNIFORM ACT §§ 2(a)(1)-(12).

⁴ UNIFORM ACT §§ 3(a)-(b).

⁵ UNIFORM ACT §§ 4(a)(1)-(c).

⁶ See generally 1 CALLMAN, UNFAIR COMPETITION AND TRADE-MARKS §§ 4.1, 16.2(a) (2d ed. 1950) [hereinafter cited as CALLMAN]; 1 NIMS, UNFAIR COMPETITION AND TRADEMARKS §§ 1-12 (4th ed. 1947).

⁷ See generally 2 CALLMAN §§ 39-43.3(b); 2 NIMS, *op. cit. supra* note 6, §§ 255-71; Note, 51 IOWA L. REV. 1066 (1966).

⁸ See generally 1 CALLMAN §§ 18-20.4(h); 2 NIMS, *op. cit. supra* note 6, §§ 290-91(a).

⁹ See *Prefatory Note* 436-38.

¹⁰ 1 CALLMAN § 4.1, at 70. (Footnotes omitted.)

¹¹ *Id.* § 2.2.

¹² OPPENHEIM, UNFAIR TRADE PRACTICES 30 (2d ed. 1965).

Originally, the doctrine of passing off only encompassed the sale of goods or services by one man while deliberately and fraudulently representing them to be those of another.¹³ As the doctrine grew, it was divided into three interrelated areas: the "confusion as to source" area, that is, deceptive labeling or packaging; the "confusion as to product" area, that is, product simulation; and, the "direct substitution of goods" area.¹⁴ The leading case dealing with source confusion was *Singer Mfg. Co. v. June Mfg. Co.*,¹⁵ which caused the federal courts to develop a concept of secondary meaning in the absence of a technical trademark.¹⁶ However, the presence of various requirements limited the scope of the action. These requirements were that there be actual competition between the parties,¹⁷ that actual deception of the consuming public be shown,¹⁸ and that a fraudulent intent be shown.¹⁹

By 1938 the federal courts had developed a well-defined though narrow source confusion law. In the product confusion area, however, the courts were faced with the basic proposition that a product in the public domain — that is, not protected by the patent or copyright laws — could be freely copied by anyone.²⁰ The Supreme Court's attempt to widen this area was ineffective,²¹ although the courts, by developing the non-functional and secondary meaning doctrines,²² again developed a comprehensive body of case law.²³

¹³ See, e.g., *McLean v. Fleming*, 96 U.S. 245 (1877). For a brief history see NIMS, *op. cit. supra* note 6, §§ 1-5.

¹⁴ See Note, *Uniform Deceptive Trade Practices Act: Effect of Sears and Compco*, 50 IOWA L. REV. 836 (1965).

¹⁵ 163 U.S. 169 (1896).

¹⁶ See OPPENHEIM, *op. cit. supra* note 12, at 65-67.

¹⁷ See, e.g., *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510 (7th Cir. 1912).

¹⁸ See, e.g., *M. Werk Co. v. Ryan Soap Co.*, 14 Ohio C.C.R. (n.s.) 122 (1911), *aff'd mem.*, 88 Ohio St. 539, 106 N.E. 1070 (1913).

¹⁹ See, e.g., *Wisconsin Elec. Co. v. Dumore Co.*, 35 F.2d 555 (6th Cir. 1929). The landmark broadening case of *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), has not been followed. 1 CALLMAN § 4.1, at 75. *But cf. Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509 (6th Cir. 1924).

²⁰ "The courts distinguished between functional and non-functional design features, enjoining *only* the copying of non-functional features of an article which had developed a 'secondary meaning' . . . if it had come to be identified in the public's mind as originating from a given source." Peterson, *The Legislative Mandate of Sears and Compco: A Plea for a Federal Law of Unfair Competition*, 56 TRADEMARK REP. 16, 23 (1966) (this article is reprinted from 69 DICK. L. REV. 347 (1965)).

²¹ See cases cited note 19 *supra*.

²² See note 20 *supra*; see, e.g., *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 Fed. 299 (2d Cir. 1917).

²³ See Note, *supra* note 14, at 842.

Other forms of deceptive trade practices, in addition to passing off, are common. Examples include false or unfair advertising, price discrimination, interference with contractual rights, trade boycotts, and commercial disparagement of products.²⁴ False advertising and disparagement are specifically forbidden by the Uniform Deceptive Trade Practices Act.²⁵

Disparagement has its roots in the traditional right of action at law for libel and slander, giving rise to the claim that "disparagement of a competitor's goods is straight-jacketed into the all too narrow frame of libel and slander."²⁶ Historically, the plaintiff was required to plead and prove traditional tort elements, namely, publication of a false factual statement, malicious intent to cause pecuniary loss, and special damages as a result of the defamation.²⁷ Although the federal courts began to enjoin such conduct early in this century,²⁸ it should not be assumed that any significant gains were made.²⁹

The cause of action for false advertising³⁰ was subject to many of the same restraints as disparagement, as is evidenced by the leading federal case of *American Washboard Co. v. Saginaw Mfg. Co.*³¹ This restrictive view is still prevalent.³² Injunctive relief has been limited to situations in which the defendant's advertisements referred to a product on which the plaintiff had a pure and total monopoly.³³

In the source confusion area, therefore, the federal courts went

²⁴ 1 CALLMAN, § 4.1, at 74.

²⁵ UNIFORM ACT §§ 2(a)(5)-(11).

²⁶ 1 CALLMAN § 4.1, at 74; see, e.g., *Marlin Fire Arms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 163 (1902).

²⁷ Note, 51 IOWA L. REV. 1066, 1067 (1966). See generally *id.* at 1067-70; *Developments in the Law — Competitive Torts*, 77 HARV. L. REV. 888, 892-905 (1964); Address by Werner Janssen, Jr., United States Trademark Ass'n Annual Meeting, May 25, 1962, in 53 TRADEMARK REP. 273 (1963).

²⁸ See 2 CALLMAN § 39.1(d), at 698-700.

²⁹ See *International Visible Syss. Corp. v. Remington-Rand, Inc.*, 65 F.2d 540 (6th Cir. 1933).

³⁰ See generally 1 CALLMAN §§ 18-20.5; Callman, *False Advertising as a Competitive Tort*, 48 COLUM. L. REV. 876 (1948); *Developments in the Law — Competitive Torts*, 77 HARV. L. REV. 888 (1964).

³¹ 103 Fed. 281 (6th Cir. 1900).

³² See *California Apparel Creators v. Wieder, Inc.*, 162 F.2d 893 (2d Cir. 1947).

³³ See *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927). Compare RESTATEMENT, TORTS § 761 (1939) with RESTATEMENT (SECOND), TORTS § 712 (Tent. Draft No. 8, 1963). "In no reported common law case has a court gone even so far as the first *Restatement* position." *Developments in the Law — Competitive Torts*, 77 HARV. L. REV. 888, 907 (1964).

far beyond the traditional palming off concept and developed a body of law which held that the copying of another's product, labeling, or dress³⁴ in a manner likely to deceive the public³⁵ was illegal and entitled the injured party to both damages and an injunction.³⁶

This expansion of unfair competition by the federal courts came to an abrupt halt in 1938 with *Erie R.R. v. Tompkins*.³⁷ By the stroke of a pen the "liberal" federal diversity cases were deprived of binding effect in the very courts that had decided them. Federal judges were thereafter required to apply state law whenever they obtained jurisdiction over an unfair competition claim. The rub was that state law had marked time during the period that federal law was evolving.³⁸

That such narrow prerequisites as actual competition and intent to deceive were imposed by the states attenuated the problem,³⁹ and the fact that whatever state law existed prior to *Erie* was not uniform created further problems. In 1941, a Supreme Court decision applying *Erie* to conflict of laws cases worsened an already lamentable situation.⁴⁰ To correct this state of affairs, it has often been urged that a federal law of unfair competition be enacted.⁴¹ It has also been suggested that minor amendments to presently existing federal statutes could accomplish this purpose.⁴² Proposed bills on the subject of unfair competition have been introduced

³⁴ See, e.g., *S.S. Kresge Co. v. Champion Spark Plug Co.*, 3 F.2d 415 (6th Cir. 1925).

³⁵ See, e.g., *Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509 (6th Cir. 1924).

³⁶ *Ibid.*

³⁷ 304 U.S. 64 (1938).

³⁸ *Prefatory Note* 435.

³⁹ See Note, 50 IOWA L. REV. 836 (1965).

⁴⁰ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

⁴¹ See *Hearings on H.R. 4651 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. (1964); Diamond, *The Proposed Federal Unfair Commercial Activities Act*, 23 OHIO ST. L.J. 110 (1962); Peterson, *supra* note 20, at 48-49. Federal question cases in which unfair competition claims are joined are a different problem. Such joinder is allowed via 28 U.S.C. § 1338(b) (1964) on the pendent jurisdiction theory. See *Hurn v. Oursler*, 289 U.S. 238 (1933). Some courts have said there now exists a federal common law of unfair competition, while others reject this idea. Compare *Bliss v. Gotham Indus., Inc.*, 316 F.2d 848 (9th Cir. 1963), with *Flexitized, Inc. v. National Flexitized Corp.*, 214 F. Supp. 664 (S.D.N.Y. 1963). Certain federal statutes have also been interpreted by some to create a federal law. See CALLMAN § 94.3; Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949). Compare *Federal-Mogul-Bearings, Inc. v. Azcoff*, 313 F.2d 405 (6th Cir. 1963), with *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954).

⁴² Peterson, *supra* note 20, at 34-43.

into the House of Representatives four times since 1959 but have met with no success.⁴³

All of these factors created a situation to which the National Conference of Commissioners on Uniform State Laws began to devote its attention in 1958.⁴⁴ The result was the promulgation of the Uniform Deceptive Trade Practices Act⁴⁵ which has to date been adopted in Connecticut, Delaware, Idaho, Illinois, and, with modifications, Oklahoma.⁴⁶ The Uniform Act, soon to be considered by the Ohio General Assembly, consists of twelve sections. Paragraph 12 of section 2(a) covers "any other conduct which similarly creates a likelihood of confusion or of misunderstanding."⁴⁷ Its purpose is to allow "the courts to block out new kinds of deceptive trade practices."⁴⁸ "The deceptive trade practices singled out by the Uniform Act can be roughly subdivided into conduct involving either misleading trade identification or false or deceptive advertising,"⁴⁹ while paragraph 12 was inserted in an attempt to insure that the ingenuity of those who engage in deceptive trade practices will not result in circumvention of the purposes of the act.

Section 3 of the act, the remedies section, provides for injunctive relief to anyone likely to be damaged; proof of actual damage or wrongful intent is not required.⁵⁰ Section 4 excludes from the purview of the act those actions taken in compliance with orders "of a governmental agency, publishers or disseminators of printed or pictorial matter who publish without knowledge . . . and acts prior to the adoption of the statute."⁵¹

⁴³ *Id.* at 43-45.

⁴⁴ See SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW, SUMMARY OF PROCEEDINGS 1958 ACT 45.

⁴⁵ *Prefatory Note* 435.

⁴⁶ CONN. GEN. STAT. ANN. §§ 42-115(c)-(f) (Supp. 1965); 55 Del. Laws 1965, at 92; IDAHO CODE ANN. §§ 48-601 to -606 (Supp. 1965); ILL. ANN. STAT. ch. 121½, §§ 311-17 (Smith-Hurd Supp. 1966); OKLA. STAT. ANN. tit. 78, §§ 51-55 (Supp. 1966). For a discussion of the Oklahoma modifications, see Merrill, *Oklahoma and the National Conference of Commissioners on Uniform State Laws*, 36 J. OKLA. B.A. 2205 (1965). Research has revealed no cases yet decided interpreting the act in these states.

⁴⁷ UNIFORM ACT § 2(a)(12).

⁴⁸ Comment to UNIFORM ACT § 2(a)(12).

⁴⁹ *Prefatory Note* 436.

⁵⁰ UNIFORM ACT § 3(a). Subsection 3(b) provides that a court may in its discretion award costs and attorneys fees if the defendant wilfully engaged in the wrongful conduct. Subsection 3(c) makes it clear that the remedies under the act are non-exclusive.

⁵¹ Peterson, *supra* note 20, at 47.

Certain other features of the act should be noted. Section 3(a) provides that "relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source."⁵² A comment makes it clear that the purpose of the provision is to accommodate the act with two recent Supreme Court decisions.⁵³ Section 3(b)⁵⁴ has been criticized for not allowing recovery of profits, treble damages, or reasonable attorney's fees.⁵⁵ Such criticism, however, overlooks the fact that the act is designed primarily to protect the consumer rather than business.⁵⁶ Thus, the act is written in terms of likelihood of confusion to the consumer, defines most deceptive trade practices with reference to such confusion, and allows any person who is "likely to be damaged by a deceptive trade practice of another"⁵⁷ to obtain an injunction. Moreover, the act provides that all other common law remedies may be used in addition to the injunctive remedies of the act itself.⁵⁸ In order to gauge the impact of the act upon Ohio law, it is necessary to ascertain the state of Ohio law in the three primary areas covered by the proposed legislation.

In the direct substitution of goods area, the act will not affect Ohio law. Direct substitution is the most flagrant type of passing off and is prohibited by section 2(a)(1) of the Uniform Act. Such activity has long been illegal in Ohio.⁵⁹ Section 2(a)(1) also prohibits activities in the "confusion as to product" area, such as product simulation, since, as has been shown, passing off encompasses the copying of an article in such a way as to lead to a likelihood of confusion among consumers.⁶⁰ In *Brill v. Singer Mfg. Co.*,⁶¹ the Ohio Supreme Court stated that "anyone may make anything

⁵² UNIFORM ACT § 3(a).

⁵³ Comment to UNIFORM ACT § 3(a); see Leeds, *Impact of Sears and Compco*, 55 TRADEMARK REP. 188, 192-93 (1965); Peterson, *supra* note 20, at 46-47. The two decisions mentioned are *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

⁵⁴ See note 50 *supra*.

⁵⁵ Leeds, *supra* note 53, at 193.

⁵⁶ As has been noted, no right of action exists under the act unless there is a likelihood of consumer confusion. Since § 2(b) of the act removes actual competition as an element, it seems clear that the purpose of the act is to protect consumers.

⁵⁷ UNIFORM ACT § 3(a).

⁵⁸ UNIFORM ACT § 3(c).

⁵⁹ See *Rothchild's Sons' Co. v. Brunswick-Balke-Collender Co.*, 12 Ohio C.C.R. 741 (Cir. Ct. 1894); *Ireland v. Higginson*, 28 Ohio N.P. (n.s.) 110 (C.P. 1930); *Block Light Co. v. Tappehorn*, 2 Ohio N.P. (n.s.) 553, (C.P. 1904).

⁶⁰ See 1 CALLMAN § 16.2(d).

⁶¹ 41 Ohio St. 127 (1884).

in any form, and may copy with exactness that which another has produced . . . unless he attributes to that which he has made a false origin"⁶² It is clear that the court was boldly declaring that even though secondary meaning might be present and there might be an exact copying, there would not be unfair competition unless the labeling of the article also tended to create a likelihood of confusion.⁶³

Just five years later, however, the court affirmed a decision which went well beyond *Brill*.⁶⁴ In affirming the issuance of an injunction against the copying of the plaintiff's safe cabinet, the court found secondary meaning⁶⁵ and held that "any manufacturer has the right to copy an article made by another which is not protected by patent, but he has not the right to so imitate it in shape, design, color, and number as to deceive purchasers of average intelligence"⁶⁶ The court concluded that the copying of the device's functional aspects would result in buyers' being induced to purchase the defendant's product as being of the plaintiff's manufacture.⁶⁷

Although recent decisions have had contrary results,⁶⁸ the conflict is probably moot in light of *Tappan Co. v. General Motors Corp.*,⁶⁹ wherein *West Point Mfg. Co. v. Detroit Stamping Co.*,⁷⁰ was cited to support the holding that copying is not unfair competition in the absence of palming off.⁷¹ Thus, Ohio seems to have returned to the *Brill* rule, and since this rule is in accord with the Uniform Act as interpreted previously, it is unlikely that the act will change Ohio law.

In the "confusion as to source" area, the Uniform Act is quite

⁶² *Id.* at 138.

⁶³ It should be noted that *Brill* was criticized in *French Bros. Dairy v. Giacini*, 20 Ohio Dec. 638 (C.P. 1909), where the court pointed out that *Brill* failed "because at that time the doctrine of unfair competition had not been fully developed." *Id.* at 648.

⁶⁴ *Safe-Cabinet Co. v. Globe Wernicke Co.*, 3 Ohio App. 24 (1914), *aff'd*, 92 Ohio St. 532 (1915).

⁶⁵ *Id.* at 27.

⁶⁶ *Id.* at 35.

⁶⁷ *Id.* at 32.

⁶⁸ *West Point Mfg. Co. v. Detroit Stamping Co.*, 222 F.2d 581 (6th Cir. 1955); *Diebold, Inc. v. Record Files, Inc.*, 135 F. Supp. 74 (N.D. Ohio 1955), *aff'd on other grounds*, 237 F.2d 527 (6th Cir. 1956).

⁶⁹ 245 F. Supp. 972 (N.D. Ohio 1965).

⁷⁰ 222 F.2d 581 (6th Cir. 1955).

⁷¹ 245 F. Supp. at 974.

broad.⁷² Most instances of such confusion are caused by the deceptive labeling or dressing of goods or products. Ohio case law seems to be firmly established in this area.⁷³

Section 2(a)(2) cases — likelihood of confusion as to source, sponsorship, approval, or certification — are quite numerous. The early case of *Cohn v. Kahn*⁷⁴ stands for the proposition that the use of another's trade name, although it is not trademarkable, is unfair competition and may be enjoined. The leading case in the area covered by section 2(a)(2) is *Hugo Stein Cloak Co. v. S. B. Stein & Son, Inc.*,⁷⁵ where the defendant was enjoined from using his own name on his store front.⁷⁶ The court held that "it would make no difference whether the use of the name is accidental, incidental, or intentional, if it results in misleading the public and causes confusion"⁷⁷

Section 2(a)(3) — likelihood of confusion as to affiliation, connection or association with or certification by — also has parallel Ohio case law. A recent Ohio Supreme Court case which allowed injunctive relief was *National City Bank v. National City Window Cleaning Co.*,⁷⁸ apparently following the rationale expressed by a district court: "The potential injury to the trade of another, or the likelihood of confusion or mistake . . . is not the only equitable consideration. The larger and determining factor or issue is whether the use made of the other's established trade name is calculated to, and probably will, create in the public mind the belief that the two are related"⁷⁹ The cases indicate that while sections 2(a)(2) and 2(a)(3) may expand Ohio's law of unfair competition, they will not change it in any respect. No Ohio cases have been

⁷² UNIFORM ACT § 2(a)(2)-(3), (5)-(7).

⁷³ See notes 74-83 *infra* and accompanying text.

⁷⁴ 8 Ohio Dec. Reprint 472 (C.P. 1882); see also *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337 (1903). Compare *Socony-Vacuum Oil Co. v. Oil City Refiners, Inc.*, 136 F.2d 470 (6th Cir.), *cert. denied*, 320 U.S. 798 (1943), with *E. & J. Gallo Winery v. Gallo*, 87 F. Supp. 433 (N.D. Ohio 1949).

⁷⁵ 58 Ohio App. 377, 16 N.E.2d 609 (1937). See also *Henry Furnace Co. v. Kappelman*, 91 Ohio App. 451 (1952); *Cleveland Opera Co. v. Cleveland Civic Opera Ass'n*, 22 Ohio App. 400 (1926). But cf. *Ohio Nat'l Life Ins. Co. v. Ohio Life Ins. Co.*, 210 N.E.2d 298 (C.P. 1962), *aff'd*, 3 Ohio St. 2d 44 (1965).

⁷⁶ 58 Ohio App. at 385, 16 N.E.2d at 612.

⁷⁷ *Id.* at 384, 16 N.E.2d at 612.

⁷⁸ 174 Ohio St. 510, 190 N.E.2d 437 (1963), *affirming in pertinent part and reversing in part* 180 N.E.2d 20 (Ohio App. 1962). See also *Lippman v. Martin*, 5 Ohio N.P. 120 (Super. Ct. 1898).

⁷⁹ *Radio Corp. of America v. R.C.A. Rubber Co.*, 114 F. Supp. 162, 165 (N.D. Ohio 1953).

found which would fall under section 2(a)(4) which prohibits deceptive representations as to geographic origin.

Sections 2(a)(5), (6), and (7) are directed toward false or misleading advertising. One Ohio case, *Hagmeir v. Hulshizer*,⁸⁰ seems to fall squarely under 2(a)(7). There, the defendant circulated advertisements that the plaintiff's first grade flour was actually second grade. The plaintiff was allowed to recover damages although no injunctive relief was given or requested.⁸¹ Although no cases seem to fall under 2(a)(5) or (6), it is not unreasonable to conclude, first, that many of the cases which come under subparagraphs (1), (2), and (3) of section 2(a)⁸² would also be violative of subparagraphs (5) and (6); and, second, that the Ohio courts would have no difficulty in enjoining violations of these sections.⁸³

Section (2)(a)(8) is the disparagement provision of the Uniform Act, and it seems to have some decisional support in Ohio.⁸⁴ In *Yood v. Daly*,⁸⁵ the defendant, a rabbi, made false representations to the effect that the goods sold in the plaintiff's store were not kosher. In reversing the trial court's judgment sustaining the defendant's demurrer, the Summit County Court of Appeals held that an injunction would lie to prevent the rabbi from continuing to make these false statements if irreparable damage were shown.⁸⁶ Thus section 2(a)(8) would seem to expand the Ohio law by giving relief on a mere showing of likelihood of confusion rather than irreparable damage.

Section 2(a)(9) of the Uniform Act — advertising goods with the intent not to sell them as advertised — has been enjoined at common law in Ohio.⁸⁷ No Ohio cases have been found which squarely fall under the prohibitions of section 2(a)(10) — bait advertising — or section 2(a)(11) — spurious "fire" and "liquidation" sales. Section 2(a)(12) of the Uniform Act — the catchall provision — has been discussed previously.

⁸⁰ 11 Ohio N.P. (n.s.) 507 (C.P. 1910).

⁸¹ *Id.* at 510.

⁸² See cases cited notes 61, 64, 68, 74-79 *supra*.

⁸³ See *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947).

⁸⁴ See *International Indus. & Dev., Inc. v. Farbach Chem. Co.*, 241 F.2d 246 (6th Cir. 1957); *Yood v. Daly*, 37 Ohio App. 574, 174 N.E. 779 (1930); *Henry Gehring Co. v. McCue*, 23 Ohio App. 281, 154 N.E. 171 (1926); *Hagemeier v. Hulshizer*, 11 Ohio N.P. (n.s.) 507 (C.P. 1910).

⁸⁵ 37 Ohio App. 574, 174 N.E. 779 (1930).

⁸⁶ *Id.* at 576-77, 174 N.E. at 779-80.

⁸⁷ See *Rothchild's Sons' Co. v. Brunswick-Balke-Collender Co.*, 12 Ohio C.C.R. 741 (Cir. Ct. 1894); *Ireland v. Higginson*, 28 Ohio N.P. (n.s.) 110 (C.P. 1930).

Section 2(b) of the Uniform Act states that in order to prevail in an action brought under its provisions, the plaintiff need not prove competition between the parties or actual confusion or misunderstanding. While there are early cases to the contrary,⁸⁸ this provision would seem to enact no new law in Ohio.⁸⁹

Section 3(a) of the act provides that suit may be brought by any person likely to be damaged by the deceptive trade practice. From the cases previously discussed it is clear that this will be no innovation to Ohio law⁹⁰ in general, although it is certainly possible that under section 3(a) courts may be more liberal in finding standing to bring the suit than they have in the past. Section 3(a) provides that proof of monetary damage, loss of profits, or intent to deceive is not required. Again, this is consistent with Ohio law.⁹¹

The Uniform Deceptive Trade Practices Act, if adopted in Ohio, would not overturn any Ohio precedent. However, because of the generality of the act's language, it might be construed to cover areas of activity which have heretofore not been covered by the common law. Because of the scarcity of precedent in some of the areas covered by the act, all that can be said with assurance is that Ohio is probably more progressive than most other states, with the possible exception of California,⁹² and that although the Uniform Deceptive Trade Practices Act will expand Ohio law, it will not alter the authority of previous Ohio judicial decisions.

The law of unfair competition today is a "morass"⁹³ of non-uniform state case and statutory law, federal law, and mixed concepts of business ethics and legal remedies. None of the remedies presently available adequately protect consumers from the small or medium-sized operator who engages in deceptive trade practices. The Uniform Deceptive Trade Practices Act, by making an inexpensive remedy available to one who is likely to be damaged by such

⁸⁸ See, e.g., *Plasterer v. Cross*, 17 Ohio App. 265 (1922).

⁸⁹ See *Socony-Vacuum Oil Co. v. Oil City Refiners, Inc.*, 136 F.2d 470 (6th Cir.), *cert. denied*, 320 U.S. 798 (1943).

⁹⁰ See cases cited notes 74-75, 77-80, 84, 86 *supra*.

⁹¹ See, e.g., *National City Bank v. National City Window Cleaning Co.*, 180 N.E. 2d 20 (Ct. App. 1963), *aff'd in pertinent part*, 174 Ohio St. 510, 190 N.E.2d 437 (1963).

⁹² For a discussion of the California statutes and cases, see *Prefatory Note* 437-38.

⁹³ Interview with Albert P. Sharpe III, Cleveland patent and trademark attorney, Oct. 4, 1966.

conduct, should offer a solution unless the courts unreasonably limit its application. No cogent arguments against the act have been made, and none can be foreseen; thus, it should be adopted in Ohio.

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